J.C. Penney Corporation, Inc. *and* Local 3, United Storeworkers, Retail, Wholesale and Department Store Union, United Food and Commercial Workers Union. Case 29–RC–11193

May 30, 2006

DECISION AND DIRECTION

BY MEMBERS SCHAUMBER, KIRSANOW, AND WALSH

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held for a unit of employees at the Employer's Queens Center Mall store on August 19 and 20, 2005, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 123 votes cast for and 117 against the Petitioner, with 12 challenged ballots, a number sufficient to affect the outcome of the election.

The Board has considered the record in light of the exceptions and brief and has decided to affirm the hearing officer's rulings, findings, and conclusions only to the extent consistent with this Decision and Direction.

We reverse the hearing officer's recommendation to overrule the challenge to Magaly Ochoa's ballot. We find that Ochoa was ineligible to vote in the election; therefore the challenge to her ballot is sustained. We also reverse the hearing officer's recommendation to sustain the challenge to Betty Pawlak's ballot; we therefore direct that Pawlak's ballot be opened and counted.[1]

The challenge to Magaly Ochoa's ballot

I. FACTS

The Employer challenged the ballot of Magaly Ochoa on the ground that her employment had been terminated by the date of the election. The record shows that Ochoa went on a leave of absence on August 11, 2004[2] for "family issues" and was scheduled to return about 2 months later on October 7. She never returned to work.

The Employer presented one witness, disability plans manager Jim Cuva, to support its contention that Ochoa was terminated.[3] According to Cuva, the Employer allows employees to request personal discretionary leaves of absence of up to 12 months.[4] The Employer's computer software automatically "terminates" an employee who has been on a leave of absence for longer than 365 days if the employee does not return to active status. Ochoa's record indicates that she did not extend her leave beyond the 2 months for which she was approved, and that after 365 days—on August 12, 2005—she was terminated. The Employer therefore considered her terminated as of the August 19–20, 2005 election. Cuva testified that there is no record that the Employer notified Ochoa of her termination.

II. THE HEARING OFFICER'S REPORT

The hearing officer found that Ochoa's leave of absence had been extended beyond October 7, and that the circumstances surrounding the extension were unclear. He found that the Employer failed to rebut the presumption that Ochoa remained in employee status through the election,[5] noting that Cuva had not had any contact with Ochoa and therefore did not know whether Ochoa had requested an extension of her leave of absence directly from the Queens Center Mall store, where she worked.

III. ANALYSIS

In order to be eligible to vote in an NLRB election, an individual must be employed on both the eligibility date and the date of the election. E.g., *Agar Supply Co.*, 337 NLRB 1267, 1268 (2002). An employee on a leave of absence is presumed to continue in leave status unless the presumption is rebutted by an affirmative showing that the employee has resigned or been discharged; nevertheless, an "affirmative termination can be found even in the absence of any formal or informal communication, in instances where the surrounding circumstances make clear that the employment relationship has ended." *Air Liquide America Corp.*, 324 NLRB 661, 663–664 (1997) (citing *Cavert Acquisition Co. v. NLRB*, 83 F.3d 598, 607 (3d Cir. 1996)).[6]

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendations to sustain the challenge to the ballot of Melissa Guerrero and to direct that the ballots of Shivaugn Frank, Francia Castillo, Richard Leconte, Leonardo Mazzini, and Mario Montanez be opened and counted, and that all remaining objections be withdrawn. In the absence of exceptions, we also adopt pro forma the Regional Director's recommendations to sustain the challenge to the ballot of Aracelis Rodas and to overrule the challenges to the ballots of Julieta Henao, Benita Rios, and Karolin Abbadessa.

[2] All dates are in 2004 unless otherwise noted.

[3] Ochoa did not testify.

[4] The Employer also provides a procedure for requesting an extension beyond the 12-month period.

[5] The hearing officer inadvertently stated the date of the election as August 12 2005, which was the date of Ochoa's termination. The hearing officer also stated that Cuva testified that Ochoa's name appeared on the *Excelsior* list; Cuva did not testify to this, but only that the Employer considered her employed up to August 12, 2005, when she was terminated.

[6] In *Air Liquide*, the Board found no termination of employment where, after the collective-bargaining agreement expired, an employer terminated an employee on leave for union business without notifying the employee that he was terminated, despite the employee's multiple

Here, there is no showing that Ochoa had been notified of her termination. Therefore, the question is whether the surrounding circumstances make clear that Ochoa's employment relationship with the Employer had ended by the date of the election.[7]

At the outset, we note that nothing in the record supports the hearing officer's finding that Ochoa's leave was extended beyond the 2 months for which it had been approved.[8] Cuva testified that an extension would have been in Ochoa's record, which shows only the Employer's approval of Ochoa's original 2-month leave request and her termination 1 year later. Moreover, under the Employer's policy, the employee has the burden of informing the employer of any wish to extend a leave. There is nothing in Ochoa's database record to indicate that she so informed the Employer or attempted to do so. Had Ochoa communicated with her store directly, and had this led to an extension of her leave or any other change in her employment status, this change would appear in her record. It does not. In any event, even if the leave had been extended as the hearing officer found, there is no dispute that Ochoa was terminated in the Employer's records on August 12, 2005, according to the Employer's established practice, and was thus ineligible to vote in the August 19–20, 2005 election.

The challenge to Betty Pawlak's ballot

I. FACTS

The Union challenged Betty Pawlak's ballot on the ground that she was a supervisor under Section 2(11) of the Act, based on her alleged authority to hire new employees. Pawlak was a training supervisor at the time of the election. Natalie Debuche, a training supervisor until her termination on June 6, 2005, testified for the Union as to the training supervisors' duties during the time she held that position. Pawlak became a training supervisor shortly before Debuche's termination; Debuche testified that they worked together for about 2 months. Assistant Store Manager Melissa Ioanna testified for the Employer as to Pawlak's duties. Pawlak did not testify.

The Employer has a human resources kiosk at the store where job applicants complete computerized applications. As a training supervisor, Debuche was directed by a manager to review applications on the computer and then call applicants to come into the store to be interviewed. In these interviews, Debuche checked the applicants' availability and experience and then sent them on to the requesting manager to be interviewed. Debuche testified that after the interview she decided whether to hire the applicant. She testified that she had the sole responsibility to hire most new employees. Although she testified that she made hiring decisions before applicants met with managers, she explained that the managers "never objected so it was always my decision." According to Debuche's testimony, after Ioanna started in February, Ioanna told her that applicants should meet with managers before they were placed in the department. In contrast, Ioanna testified that she told both Debuche and Pawlak that "they were not to hire; they process the hire, they do the new hire orientation but . . . a manager in all cases is supposed to interview the associate." Ioanna testified that after she gave that direction, managers interviewed all applicants; Debuche conceded this during cross-examination.

Debuche stated that Pawlak had hired people. When asked for examples, however, her testimony was inconclusive as to what role, if any beyond ministerial, Pawlak had in the hiring process. Specifically, Debuche testified that she once returned from a few days off to find new employees in the Salon department, and that Pawlak's name was on their hiring paperwork. In later testimony, Debuche conceded that the training supervisors did not interview applicants for that department, only the manager did. Debuche also testified that hiring had slowed down at the store around the time Pawlak became a training supervisor, and that "from the time I left I don't know what's going on at the store."

Only Ioanna specifically described Pawlak's duties. According to Ioanna's unrefuted testimony, Pawlak was responsible for doing the paperwork when the store hired a new associate, but was not responsible for making hiring decisions. As to Pawlak's role in calling in applicants for interviews, Ioanna testified:

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attempts to contact his employer and discuss his status. In contrast, the Board upheld the challenge to an employee's ballot where, after the employee had been gone 4 months on medical leave, the employer determined that the employee was unlikely to return and terminated her in its records, yet failed to notify her of her termination. *Harry Lunstead Designs*, 270 NLRB 1163, 1164 (1984) (cited with approval in *Cavert Acquisition*, above, 83 F.3d at 607). See also *Hercules, Inc*., 225 NLRB 241, 242 (1976) (finding termination where an employee remained on medical leave beyond the employer's allowed time limits, and where the employer notified its headquarters, but not the employee, of the termination) (cited with approval in *Air Liquide*, above, 324 NLRB at 663 fn. 18, and *Cavert Acquisition*, above at 607).

The Board in *Air Liquide* cited and clarified the test in *Red Arrow Freight Lines*, 278 NLRB 965 (1986). Member Schaumber notes that no party has urged reconsideration of this precedent and he therefore applies it here; nevertheless, he finds that Ochoa was ineligible to vote under either *Red Arrow* or the "reasonable expectancy of reemployment" test, applied to employees laid off for economic reasons, as discussed in *Vanalco, Inc*., 315 NLRB 618 (1994).

[7] E.g., *Air Liquide*, 324 NLRB at 663–664.

[8] The hearing officer may have inferred that Ochoa's leave had been extended because the Employer's database retained her in employee status after she failed to return as scheduled.

> I'll communicate to her, "We need a couple of people, can we look for people that work Wednesday, Friday, Saturday, Sunday nights?" Betty reviews the list of applicants, pulls some of those applicants out based on their availability, what we're looking for, make[s] sure that availability is present and then she passes it off to whomever needs to interview—do a full interview.

According to Ioanna, before passing the applicants on to the appropriate manager, Pawlak spoke to them for 5 or 10 minutes to verify the information on their applications. Ioanna conceded that she was not aware of any applicant Pawlak had recommended[9] who was not then hired by the Employer.

II. THE HEARING OFFICER'S REPORT

The hearing officer found that Pawlak, as a training supervisor, was given authority by the Employer to screen, interview, and independently hire employees on behalf of management, "subject only to discussing with managers of the department to which they will be assigned." He thus concluded that Pawlak was a statutory supervisor and that the challenge to her ballot should be sustained.[10]

III. ANALYSIS

The burden of proving supervisory status rests with the person asserting it. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). Possession of any one of the indicia specified in Section 2(11) of the Act[11] is sufficient to confer supervisory status on an employee, provided that authority is exercised with independent judgment on behalf of management and not in a routine manner. E.g., *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). The power to effectively recommend a hire, as used in Section 2(11), contemplates more than the mere screening of applications or other ministerial participation in the interview and hiring process. See id. at 1225 (assistant foreman who interviewed applicants and advised management of the experience of at least one of them did not make hiring decisions or effective recommendations to hire, as management also interviewed all applicants and had final hiring authority); *The Door*, 297 NLRB 601, 601–602 (1990) (finding that an employee lacked authority to effectively recommend hire where his role in the hiring process was limited to screening resumes, making recommendations with respect to technical qualifications, and participating, along with others, in applicant interviews).

No testimony indicated that Pawlak herself made hiring decisions. Ioanna's credited testimony was that Pawlak lacked hiring authority and simply steered applicants through the system and completed their hiring paperwork. In contrast, Debuche's testimony pertained primarily to her own role and solely to the period before her June 6, 2005 termination. No testimony indicated the degree to which Debuche's testimony about her own role described Pawlak's duties at the time of the election, more than 2 months after Debuche's employment ended, although the hearing officer apparently inferred that Pawlak's duties were the same as Debuche's and based his decision on that. Around the time Pawlak began as a training supervisor, Ioanna instructed the training supervisors that all applicants were to be interviewed by management, and both Debuche and Ioanna testified that this instruction was followed. Moreover, the Employer reorganized the store after Debuche left but before the election, and Debuche conceded that she did not know what the situation was at the store after she left. Debuche's testimony included the conclusory assertion that Pawlak had hired people; but the only *specific* testimony as to Pawlak's duties—including, in addition to Ioanna's testimony, Debuche's testimony concerning Pawlak's role in the hiring of Salon department employees—indicated that she exercised a ministerial role with respect to hiring and had no authority to make hiring decisions. All applicants Pawlak "recommended" were subsequently interviewed by department managers, who, along with store management, were the sole individuals vested with hiring authority.

In sum, the Union has not provided clear testimony that Pawlak exercised hiring authority, nor has it established the relevance of Debuche's testimony to Pawlak's duties at the time of the election. Moreover, Debuche, the Union's sole witness on this matter, did not refute Ioanna's credible testimony that Pawlak lacked hiring authority. Finally, the testimony did not establish that Pawlak effectively recommended hiring decisions. We therefore find that the Union did not meet its burden of establishing Pawlak's supervisory status and overrule the challenge to Pawlak's ballot.

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[9] The record did not establish the nature of Pawlak's recommendations beyond verifying applicants' information and passing the applicants on to management to be interviewed.

[10] The hearing officer generally found Natalie Debuche to be a "credible and forthright" witness, although he found some of her testimony about a separate issue to be "vague and conclusionary." As to Melissa Ioanna, he stated: "Although I found some of her answers vague and evasive, I found Ioanna to generally be a credible witness."

[11] Sec. 2(11) of the Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

DIRECTION

It is directed that the Regional Director for Region 29 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Shivaugn Frank, Francia Castillo, Richard Leconte, Leonardo Mazzini, Mario Montanez, Julieta Henao, Benita Rios, Karolin Abbadessa, and Betty Pawlak. The Regional Director shall then serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. May 30, 2006

Peter C. Schaumber, Member

Peter N. Kirsanow, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD